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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-14

H. BOYD EDWARDS, JR.,

Petitioner,

v.

NANCY EDWARDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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June 30, 1971

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	3
Statement of Case	3
Reasons for Granting Writ	5
Conclusion	9
Appendix A (Opinion of Court of Appeals)	10
Appendix B (Denial of Petition for Rehearing)	16
Appendix C (Denial of Petition for Certiorari, Colorado Supreme Court)	17
Appendix D (Opinion and Order, District Court, Pitkin County)	18

CASE CITATIONS

Application of Plainfield-Union Water Co., 14 N.J. 296, 102 A.2d 1	8
Armstrong v. Manzo, 380 U.S. 545	5, 6
Covey v. Town of Somers, 351 U.S. 141	6
Grannis v. Ordean, 234 U.S. 385	5
Griffin v. Griffin, 327 U.S. 220	5, 6
Hovey v. Elliott, 167 U.S. 409	6
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306	5, 6
Roller v. Holly, 176 U.S. 398	6
Schroeder v. City of New York, 371 U.S. 208	6

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The petitioner H. BOYD EDWARDS, JR., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Colorado rendered in these proceedings on November 4, 1970.

OPINIONS

The opinion of the Court of Appeals was not officially reported and appears at Appendix A, *infra,* pp. 10-15. The denial of a petition for rehearing appears at Appendix B, *infra,* p. 16. The order of the Supreme Court of the State of Colorado denying a petition for a writ of certiorari appears at Appendix C, *infra,* 17. The opinion and order of the Dis-

trict Court of Pitkin County, State of Colorado, was unreported and appears at Appendix D, *infra*, pp. 18-21.

JURISDICTION

The opinion of the Court of Appeals was entered on November 4, 1970, and the timely petition for rehearing was denied on December 15, 1970. The Supreme Court of the State of Colorado denied certiorari on March 8, 1971. Mr. Justice White, by order dated June 2, 1971, extended the time of petitioner to file a petition for a writ of certiorari until July 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Wife commenced a divorce action in Colorado, claiming residence there, and husband was served personally in New Jersey. He did not formally appear in that action, but filed suit in New Jersey to enjoin wife from proceeding in Colorado. A temporary injunction was granted. On the day that judgment adverse to petitioner was affirmed by the New Jersey appellate court, but before mandate thereon vacating the injunction had issued, wife had a default entered in the Colorado proceeding. Two days later, at a hearing held in Colorado without notice to petitioner, default judgment was granted to wife. The Colorado courts have refused to set aside this default.

The question here presented is whether the granting of a default divorce at a hearing held without notice to petitioner was a denial of due process of law under the Fourteenth Amendment to the Constitution, where:

(a) Petitioner had contested the Colorado divorce proceeding through the courts of another state, and wife and counsel knew he intended to contest the divorce in Colorado on the merits, should it become necessary;

(b) Part of wife's case to prevent being enjoined by New Jersey from proceeding in Colorado was to the effect that petitioner would have adequate opportunity to litigate in Colorado; and

(c) Wife affirmatively misled husband to prevent him from learning in advance of the precipitate divorce hearing, and apparently acted in violation of a New Jersey restraining order.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendments, Article XIV, §1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law, . . ."

STATEMENT OF THE CASE

In July of 1964, when husband and wife were residents of New Jersey, wife left the domicile taking the children with her and went to Colorado. Attempts at reconciliation failed. In May of 1965, husband returned the children to New Jersey and immediately commenced a custody action there. On December 1, 1965, wife returned to live in New Jersey to satisfy the condition imposed by the New Jersey court for her having custody of the children. In May of 1966, wife, claiming Colorado residence, commenced this divorce action against husband in the State of Colorado, and he was served with summons and complaint on May 14, 1966, in New Jersey.

Husband did not formally appear in the Colorado action, but, before his time to do so had expired, he commenced a second New Jersey action seeking to restrain wife from proceeding with the Colorado divorce. Husband's grounds for seeking restraint were (a) that wife was not truly a resident

of the State of Colorado and, thus, the Colorado court lacked jurisdiction and (b) that the question of divorce was more properly litigated in New Jersey where the other marital matters were being litigated. Wife was restrained from proceeding in the Colorado divorce action on June 8, 1966, and that restraint continued by affirmative orders of the New Jersey courts. The last such order was issued on November 2, 1966 by the Appellate Division of the Superior Court of New Jersey. That order enjoined the prosecution of any other proceeding for divorce pending the appeal and until further order of the court.

On February 21, 1967, the Appellate Division affirmed the New Jersey trial court's decision not to permanently restrain wife from proceeding in Colorado and ordered that mandate should issue ten days thereafter unless otherwise ordered. On that same day, wife had default entered in Colorado. On February 22, 1967, carefully assuring husband that she was going to Chicago, wife left New Jersey. The record does not show whether wife went to Chicago, but on February 23, she appeared in District Court in Colorado and, without notice to husband, obtained a default divorce. At that same time, hsuband was being deposed by wife's attorneys in their New Jersey office. Before he learned of this action, husband had called Colorado counsel on February 24, 1967, and arranged for appearance to be entered in the Colorado action.

Application was promptly made to the trial court to set aside the default divorce decree on the basis that it had been procured by fraud, misrepresentation and other misconduct by the wife and that the default hearing, occurring without notice to husband, did not afford him due process of law as required by the Fourteenth Amendment to the United States Constitution. The District Court for Pitkin County, Colorado, denied petitioner's motion. Appendix D, *infra*, pp.

18-21. The Court of Appeals affirmed this decision, holding that there had been no denial of due process under the Constitution. Appendix A, *infra*, pp. 13-14. The petition for certiorari to the Supreme Court of the State of Colorado alleged, *inter alia*, that the manner of procuring the default judgment without notice to husband and by deceitful conduct by wife was a denial of due process. Thus, the petitioner's federal claim was made at the earliest opportunity and was renewed at each stage of the proceedings below.

REASONS FOR GRANTING WRIT

The default judgment of divorce entered without petitioner receiving notice adequate to afford him a reasonable opportunity to defend violates principles of due process enunciated by this Court.

A long line of decisions of this Court has held that a fundamental requirement of due process is that an individual be given the opportunity to be heard before he is deprived of his rights by judicial action. *E.g., Armstrong v. Manzo,* 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Griffin v. Griffin,* 327 U.S. 220 (1946); *Grannis v. Ordean,* 234 U.S. 385 (1914). The decision of the Colorado Court of Appeals in this case has gravely misconstrued this principle in looking only to the fact that petitioner received notice of the commencement of the action and in refusing to inquire further to determine whether that notice was reasonably calculated to enable petitioner to defend in the actual proceeding to obtain the divorce. Petitioner submits that the notice he received of the Colorado divorce action did not afford him a reasonable opportunity to defend himself at the hearing at which his rights were adjudicated, and that the default judgment entered thereat thus deprived him of his marital status without due process of law.

Certainly, a judgment does not comply with due process requirements if no notice of the proceedings whatsoever is given. *Armstrong v. Manzo, supra.* Just as certainly, a judgment violates due process if the notice given is inadequate to provide the defendant a reasonable opportunity to be heard. *Schroeder v. City of New York,* 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co., supra.* These decisions recognize that it is impossible to establish an absolute standard of constitutionally adequate notice to be applied mechanically in every case. Notice is merely a means to the end of guaranteeing an individual his right to be heard and must be judged under the circumstances of each case by its effectiveness in achieving that end. *Roller v. Holly,* 176 U.S. 398 (100); *Hovey v. Elliott,* 167 U.S. 409 (1897). In *Covey v. Town of Somers,* 351 U.S. 141 (1956), the Court held that notice of a tax lien foreclosure which would normally be adequate was insufficient as to a particular taxpayer because she was incompetent and known by the town officials to be such. In *Griffin v. Griffin, supra,* petitioner had been divorced pursuant to New York procedure which provided that the decree of divorce awarding alimony was notice that future action might be taken to enter judgment for alimony arrears. The Court held that due process required further notice of any subsequent proceedings to obtain judgment for arrears because such judgment would foreclose possible defenses.

Petitioner was notified of the Colorado divorce action on May 14, 1966. His first step in response to that notice was to preserve his right to defend the action by enjoining his wife from proceeding in Colorado. This injunction and the eight months of litigation in New Jersey which ensued clearly manifested petitioner's firm purpose to contest this divorce action. Wife and her Colorado attorney were both very much aware of petitioner's determination in this re-

spect. Petitioner testified at trial in New Jersey that he had told his wife he would not give her a divorce. Wife's attorney presented evidence to the New Jersey trial court about the rights of discovery, deposition, etc., which would be afforded a non-resident defendant by the Colorado court and he assured the New Jersey court by affidavit that Colorado would not default the defendant who first appeared at trial. After all this, a default judgment was obtained in Colorado more than nine months after process was first served with no further notice. It is also noteworthy that wife caused default to be entered on the very day the New Jersey appellate decision was announced.

Petitioner contends that where (a) he had manifested an unequivocal intention to defend an action and (b) that intention was known to the adverse party and to her attorney and (c) he had implemented that intention through protracted litigation in another state, the principle of due process outlined above demands that he be given some additional notice and opportunity to defend before default judgment is taken against him.

The violation of due process is compounded by the fact that the default judgment was taken in defiance of the clear terms of the New Jersey restraining order and through affirmative deception by respondent. On February 21, 1967, the New Jersey appellate court signed a mandate on affirmance which, by its explicit terms, would not issue for ten days. The only possible reason for this delay was to preserve the status quo while petitioner determined whether to apply for a rehearing or file a notice of appeal — or appear in the Colorado action. The decision to affirm the court below was not the order of the Appellate Court which would dissolve the outstanding injunction. The Court's mandate was its order and, until this issued, the injunction was still in force.

See, *Application of Plainfield-Union Water Co.*,14 N.J. 296, 102 A.2d 1 (1954).

Despite this, petitioner would not have been deprived of his right to be heard in the Colorado action but for his wife's deceit. The Court of Appeals completely misconceived this issue in saying that the record does not show a calculated attempt by respondent to lull petitioner into thinking she would not pursue her Colorado divorce. The record does show, clearly and unmistakably, a calculated deception by the wife, telling petitioner on February 22, 1967, that she was going to Chicago when, in fact, she was enroute to Colorado. She deliberately induced inactivity on her husband's part for the crucial two-day period — February 22 and 23 — necessary to enable her to take default against him by deceiving him as to her destination and by deposing him in New Jersey. No other explanation was suggested for the wife's misleading statements. The record is clear that this period was, in fact, the critical time to petitioner's case. On Friday, February 24, 1967, before he learned of the default judgment, petitioner called Colorado counsel and arranged for an appearance to be entered in the action the following Monday. Thus, through reliance on his wife's statements and on her compliance with the New Jersey restraining order, petitioner was deprived of his opportunity to defend this Colorado divorce action.

In summary, petitioner was notified of a Colorado action and, through protracted litigation, he contested his wife's right to bring that action. At all times, he intended to appear in and to defend that action should it become necessary. His wife knew this; her attorney knew it. Yet, acting with precipitate haste, in violation of an injunction and through deceit, she obtained a default judgment and, thus, foreclosed petitioner from exercising his constitutional right to defend himself. This was a denial of due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Colorado Court of Appeals.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS

No. 70-350

(Supreme Court No. 23194)

H. BOYD EDWARDS, JR.,

Plaintiff in Error,

v.

NANCY C. EDWARDS,

Defendant in Error.

Error to the District Court of the County of Pitkin

Hon. Clifford H. Darrow, Judge

DIV. II JUDGMENT AFFIRMED

Dwyer, Enoch & Pierce, JJ.

Dawson, Nagel, Sherman & Howard

Michael A. Williams

Denver, Colorado

Attorneys for Plaintiff in Error

John A. F. Wendt

Aspen, Colorado

Attorney for Defendant in Error.

Opinion by JUDGE PIERCE

Filed in the Court of Appeals State of Colorado Nov. 4, 1970

Elizabeth H. Dodd Clerk, Court of Appeals

This case was originally filed in the Supreme Court of the State of Colorado and subsequently transferred to the Court of Appeals under authority vested in the Supreme Court.

The parties appear here in reverse order of their appearances below and will be referred to hereinafter by their lower court designations.

In 1964, after some ten years of marriage, plaintiff, after first leaving defendant a note explaining her action, quit the family home in Green Village, New Jersey, and moved to Snowmass, Colorado, where she took up residency on her brother's ranch. Thereafter, in May of 1966, she sued defendant for divorce in the District Court of Pitkin County, Colorado, on grounds of mental cruelty.

Although summons and a copy of the complaint in divorce were personally served upon defendant in New Jersey, he did not enter an appearance, electing instead to sue in New Jersey Superior Court for an order restraining plaintiff from proceeding with her Colorado divorce action. He alleged as grounds for the restraining order (1) that plaintiff did not meet Colorado residency requirements for divorce; and (2) that any such divorce action would be more properly brought in New Jersey, before whose courts was already pending an ancillary action related to the parties' marital difficulties. A temporary restraining order was granted and plaintiff was served with a copy thereof in New Jersey.

Defendant's efforts to have this order made permanent failed, however, when on February 21, 1967, the Appellate Division of the New Jersey Superior Court affirmed the Superior Court's refusal on the merits to permanently restrain plaintiff. On that same day, plaintiff, who had temporarily returned to New Jersey to contest the ancillary action brought by her husband, contacted her Colorado counsel

and instructed him to have default entered in, and to proceed with, her Colorado divorce. On the following day, plaintiff returned to Colorado, where two days later she appeared before the District Court of Pitkin County and obtained a divorce decree by default. No reporter's transcript was made of evidence taken at this hearing.

Defendant was notified of the divorce two days later, and thereafter directed Colorado counsel to move the trial court, under R.C.P. Colo. 59, 55(c) and 60(b), for a new trial or, alternatively, to set aside the default divorce decree, on six separate grounds. After argument and submission of briefs, the court denied defendant's motion, and he now brings error, asserting abuse of discretion by the trial court in refusing to vacate and set aside the decree.

Preliminarily, we note that the issue of the sufficiency of plaintiff's residency for a Colorado divorce, one of the bases for the New Jersey restraining action, is no longer at issue; the New Jersey courts evidently resolved this against defendant when they refused to make permanent the restraining order.

The issues raised by defendant then, in our own words, are (1) did the trial court abuse its discretion by refusing to set aside its default decree in light of its failure to record testimony at the divorce hearing of February 24, 1967?, and (2) was defendant denied due process of law, in that the default decree was taken with no notice to him other than the initial "substituted service" of summons and complaint?

I.

In essence, defendant first argues that the trial court should have set aside the default decree because it failed to record testimony at the hearing of February 24, 1967. He maintains that this failure made it impossible for him to show that his wife had no grounds for divorce.

A motion to set aside a default judgment is addressed to the sound discretion of the trial court, and must be supported by clear, strong and satisfactory proof of mistake, inadvertence, surprise or neglect. R.C.P. Colo. 55(c) and 60(b); *Riss v. Air Rental, Inc.*, 136 Colo. 216, 315 P.2d 820. A party in default is not entitled to have an adverse judgment set aside simply because of an asserted underlying weakness in the other party's judgment. He must stand upon the strength of his own justifications for being in default in the first instance, and he is not entitled to assert his "meritorious defense" (here, lack of grounds for divorce) until he successfully does so.

In the instant case, however, defendant did not prove to the satisfaction of the trial court, in its discretion, that his default was justified on one or more of the grounds stated in R.C.P. Colo. 60(b). To the contrary, evidence in the record makes it clear that although he was properly served by "substituted service," defendant nevertheless elected, for reasons of his own, not to appear in his wife's Colorado divorce action, which, in itself, supports the trial court's refusal to set aside the default decree. We will not disturb this refusal on appeal. *Riss, supra.*

Accordingly, even though no transcript from which defendant could determine whether or not he had a "meritorious defense" was available, he was in no way prejudiced; for he was not entitled to assert such a defense without first satisfying the trial court that his failure to appear was justified. *Barra v. People*, 18 Colo. App. 16, 69 P. 1074. This he did not do.

II.

Defendant also asserts that lack of notice of the status of his wife's action denied him constitutional due process of law.

Plaintiff was under no obligation to protect defendant's rights in this action. Defendant knew of the action, having been properly served with summons therein. He had nine months in which to take steps to protect his rights (including the right to notice of default), by appearing in and contesting the action; instead he chose to do nothing.

The instant record does not show a calculated attempt by plaintiff to lull defendant into believing that she would not pursue her Colorado divorce; to the contrary, her entire course of conduct makes it clear to us, and should have made it clear to defendant, that she would proceed with that action as soon as possible, and that he would be well advised to affirmatively act to protect his own rights. For this reason, we do not find *Rudd v. Rogerson,* 152 Colo. 370, 381 P.2d 995, cited by defendant in support of his argument, to be applicable.

Nor can this properly be said to be a denial of due process of law under the Constitution.

Defendant was personally served with process in this action in New Jersey, and elected to put in no appearance. Because he did not appear, he was entitled to no further notice with regard to the status of the action. R.C.P. Colo. 55(b)(2); *Hilliard v. Klein,* 124 Colo. 479, 238 P.2d 882.

Further, since this action was *in rem,* and not *in personam,* since defendant was properly served by "substituted service," since all other jurisdictional requirements were met; and since no property rights were determined, the notice afforded defendant was sufficient to meet constitutional requirements of due process of law; and the divorce was binding. *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221; *Estin v. Estin,* 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561.

For the reasons stated above, the trial court did not abuse

its discretion in refusing to set aside and vacate the instant default judgment.

Judgment is affirmed.

Judge Dwyer and Judge Enoch concur.

APPENDIX B

IN THE COURT OF APPEALS OF
THE STATE OF COLORADO

No. 70-350

(Supreme Court No. 23194)

H. BOYD EDWARDS, JR.,

Plaintiff in Error,

v.

NANCY C. EDWARDS,

Defendant in Error.

ORDER

The within case having been transferred from the Supreme Court of the State of Colorado to the within Court, pursuant to Section 37-21-10, C.R.S. 1963, as amended, and this Court now having jurisdiction herein, IT IS ORDERED:

Upon consideration of the Petition for Rehearing filed by Plaintiff in Error herein, the same is hereby DENIED.

Unless otherwise ordered, REMITTITUR will issue December 22, 1970.

BY THE COURT, Dwyer, Enoch and Pierce, JJ.

Dated December 15, 1970.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF COLORADO

No. C-73

January Term, 1971

H. BOYD EDWARDS, JR.,

Petitioner,

vs.

NANCY C. EDWARDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

March 8, 1971

By the Supreme Court
Sitting En Banc
Unanimously

Mr. Chief Justice Pringle
not participating

APPENDIX D

IN THE DISTRICT COURT IN AND FOR
THE COUNTY OF PITKIN
STATE OF COLORADO

Civil Action No. 3660

NANCY C. EDWARDS,

Plaintiff,

v.

H. BOYD EDWARDS, JR.,

Defendant.

ORDER

This cause comes on for consideration by the Court of the defendant's motion for new trial or to set aside default and default judgment.

On April 20th, 1967, the motion was orally argued at some length by counsel of record. During the course of argument, counsel requested that the motion should be submitted to the Court on brief. The defendant had already filed a brief with the motion. It was ordered by the Court that the answering brief shall be filed within twenty (20) days from said date, and that a reply brief may be filed within thirty (30) days from the date of filing the answering brief. Upon further request of counsel, it was also ordered that further oral argument may also be had upon request made by any counsel within ten (10) days of the filing of the reply brief. No such request has been made by any counsel in the case, and the Court is of the opinion that further oral argument was unnecessary. The reply brief was filed on June 12, 1967, and the motion stands submitted to the Court for a ruling.

The Court being now well advised in the premises is of the opinion that the defendant's motion is not well taken and should not be granted in whole or in part.

The defendant was personally served with process in Morris County, New Jersey, on May 14, 1966, and was aware of the pendency of this action. This is an in rem proceeding, only, and such service for that purpose amounted to personal service of process. No relief in personam was demanded in the plaintiff's complaint.

In New Jersey the defendant sought to restrain the plaintiff from prosecuting this action [in Colorado]. A preliminary restraining order was issued by the Superior Court of Morris County, New Jersey, based on the affidavit submitted by the defendant in this action, which order was served personally upon plaintiff herein in the State of New Jersey. Upon the trial of the merits, the New Jersey Court ruled in favor of the plaintiff in this action, and found, among other things, that the defendant had committed physical acts of violence upon her. The temporary restraining order was vacated and the complaint was dismissed with prejudice. In the decision of the Superior Court it was found, as here, that the defendant herein was not particularly diligent in that case. This is illustrated by the following:

> "It is interesting to note that either through inadvertence or neglect on the part of the plaintiff [defendant herein], this matter was not approved for trial until March 25, 1966, and then only after the Court brought it to the attention of the plaintiff." (Plaintiff's Exhibit A.)

Defendant herein appealed from the Superior Court decision to the Appellate Division of that Court and the trial court was affirmed on February 21, 1967. By New Jersey law, that decision became final on the date of its rendition.

The date that the mandate was issued was immaterial. The only function of the mandate was to complete the record.

The ipse dixit of the defendant is that the plaintiff and her counsel should have looked after his welfare in this action. This cannot be expected, nor is it the law in an adversary system of jurisprudence.

The defendant was at all times represented by New Jersey counsel. There was nothing to prevent the defendant, through efforts of his counsel, from causing to be filed in this action a motion in abatement, without running the risk of making what was formerly denominated as a "general" as distinguished from a "special" appearance. Under present practice and procedure, the defendant could have raised the plea of abatement in connection with a motion in bar of this action, supported by documents, if desired, without filing a responsive pleading.

The divorce decree herein was entered on February 23, 1967. The plaintiff had no duty to inform the defendant of her plans to have her case heard on that date. She presented evidence before this Court which was sufficient for the granting of the divorce decree. The decree is entitled to absolute verity. There are no facts shown in the file that could constitute a fraud upon the Court.

The defendant complains that no court reporter was present at the non-contested divorce hearing. He was in default and his default has been entered of record. Inasmuch as no relief was granted to the plaintiff beyond or in excess of the demand in her complaint, the defendant has no interest in the record. The presence of a court reporter is for convenience of the parties and the requirement of his presence may be waived by the appearing parties. The defendant failed to enter an appearance in the action, and in those circumstances, the plaintiff had the right to proceed in the absence of a court reporter if her counsel so desired.

The plaintiff, mother of three children, has remarried since the entry of the divorce decree. The showing made by the defendant to set aside that decree or to grant a new trial is not of sufficient strength to move the Court to do so.

It is accordingly ORDERED by the Court that the Motion of the defendant for new trial or to set aside default and default judgment should be and it is hereby denied.

Done at Chambers in the City of Glenwood Springs, Colorado, this 26th day of June 1967.

Clifford H. Darrow
Judge

The defendant's exceptions are noted of record.